Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

THOMAS D. HAYS, PROFESSIONAL PROPERTY MANAGEMENT OF C.U., INC., an Illinois Corporation, and BNG MANAGEMENT, a Partnership,

Petitioners,

v.

THE CITY OF URBANA, ILLINOIS, a Municipal Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Seventh Circuit Court of Appeals' failure to recognize Plaintiffs' standing in a civil rights attack on a municipal ordinance conflicts with this Court's ruling in *Pennell v. City of San Jose,* 485 U.S. 1 (1988).

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on January 6, 1997, and the denial of the Petition for Rehearing on January 22, 1997.

REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Seventh Circuit is published at 104 F.3d 102 (7th Cir. 1997). The Order affirmed the opinion of the lower court, which is unpublished. A copy of the lower court Order is included in the Appendix as "Exhibit A". The Order of the Seventh Circuit Court of Appeals is included in the Appendix as "Exhibit B". A copy of the Order denying the Petition for Rehearing is included in the Appendix as "Exhibit C". On February 14, 1997, the Seventh Circuit Court of Appeals denied Plaintiffs' Motion to Stay the Mandate. A copy of that Order is included in the Appendix as "Exhibit D".

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. § 1254(1) for review by certiorari the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. A written opinion was issued on January 6, 1997.

Petitioners Thomas D. Hays, Professional Property Management of C.U., Inc. and BNG Management filed a petition for rehearing. That petition was denied on January 22, 1997.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, Section 1437 *et seq.*

Urbana Ordinance No. 9596-66, amending Chapter 12 of the Code of Ordinances of the City of Urbana, Illinois, entitled "HUMAN RIGHTS", as passed on January 22, 1996, is set forth in the Appendix as "Exhibit E".

STATEMENT OF THE CASE

The United States Congress enacted legislation (42 U.S.C. 1437f, *et seq.*), by which individuals may apply for and receive rent subsidies for rental agreements with certain landlords who voluntarily wish to participate in a federal program (hereinafter "Section 8"). There are two phases of the Section 8 program: voucher and certificate. Under the certificate program, the tenant pays for thirty percent (30%) of their monthly adjusted income minus a utility allowance for rent. The government pays the difference between the contract rent and the amount that the tenant paid. The certificate program establishes a fair market rent based upon the size of the bedroom.

Under the voucher program, the tenant is told how much money s/he will receive, and the tenant is responsible for paying any rent in excess of the government's assistance. The voucher system employs a reasonable rent test that is established by a census of the area. Under both the certificate and voucher programs, landlords must agree to a lease addendum.

The Defendant, City of Urbana, had a Human Rights Ordinance which prohibited various forms of discrimination in certain contexts, including housing rentals. In September or October of 1995, Vacellia Clark, Defendant's Human Relations Officer, received a complaint that Town and Country Apartments (managed by Plaintiff BNG Management) did not accept Section 8 Tenants. In keeping with standard procedure, Ms. Clark did not obtain the caller's identifying information. After conferring with the City Attorney, Ms. Clark decided that she did not have jurisdiction to proceed with a formal complaint.

Ms. Clark then felt an urgency to amend the Urbana Human Rights Ordinance to prohibit discrimination against Section 8 tenants. The Urbana City Council considered the issue on an expedited schedule. Kim McCloud, an employee of the Housing Authority of Champaign County who was in charge of administering its Section 8 program, testified before the City Council. Ms. McCloud estimated that approximately 175 Section 8 tenants were residing in Urbana. Plaintiffs also appeared before the Urbana City Council and objected to the adoption of the proposed amendment. Plaintiffs repeatedly told the Defendant that the amended ordinance would mandate participation in a federal program which was supposed to be voluntary. Despite Plaintiffs' concerns and objections, the Urbana City Council enacted the

amendment to its Human Rights Ordinance on January 22, 1996. Ms. Clark stated in her deposition that, following the amendment's passage, she would feel comfortable in proceeding with a formal complaint against any landlord who refused to consider Section 8 tenants.

The amended Ordinance prohibited discrimination on the basis of "source of income". "Source of income" was defined to include "Section 8 or any other rent subsidy or rent assistance program". This effectively mandated participation by landlords in the Section 8 program; it nullified the voluntary nature of the program as created by Congress. Failure to participate in the Section 8 program would constitute "discrimination" on the basis of "source of income" and would subject a landlord to civil and quasi-criminal penalties. Additionally, a landlord would bear the stigma of being labeled a "discriminator". Compliance, on the other hand, would require a landlord to conduct a thorough screening and review of claimed Section 8 participants before refusing to rent to the Section 8 tenants. Compliance would also require the adoption of HUD Addendum to a landlord's lease, which Plaintiffs believe is against their better business judgment.

On February 28, 1996, Thomas D. Hays, Professional Property Management of C.U., Inc., and BNG Management filed a Verified Complaint for Declaratory and Injunctive Relief. This Complaint sought a declaratory judgment that the recently enacted amendment to the City of Urbana's Human Rights Ordinance was unconstitutional and invalid under the Fourteenth Amendment and the Supremacy Clause of the Constitution of the United States. This Complaint also sought to enjoin the City of Urbana from enforcing the amended ordinance.

On March 4, 1996, at the initial hearing in this cause, the District Court accelerated the case, setting a hearing for arguments on emergency and permanent relief. A further and final hearing was scheduled for April 24, 1996.

On March 5, 1996, Defendant issued a draft policy statement on the amendment. No other policy statements were issued. This policy statement decreed that the City of Urbana would prosecute when complaints were made by potential tenants. The statement described discriminatory practices as:

> Having a policy against considering potential tenants who would use Section 8 housing assistance;
>
> Informing prospective tenants that the landlord does not take Section 8, or discouraging them from applying;
>
> Refusing to participate in any aspect of the Section 8 program, such as using the required lease provisions or permitting the required inspections;
>
> Using different or additional standards for evaluating Section 8 tenants than for any other potential tenants; and
>
> Giving any preference to non-Section 8 tenants over Section 8 tenants.

In mid-March 1996, Plaintiff BNG Management employee Jan Walsh received a telephone call from an individual named "Anthony". "Anthony" inquired into whether BNG accepted Section 8 recipients. Ms. Walsh told "Anthony" that she did not believe so. "Anthony" responded, "How can you do this? You can't deny Section

8. This law just passed. My Dad's an attorney". This was one of many inquiries that Plaintiffs received from Section 8 participants subsequent to the amendment.

On or about March 11, 1996, Defendant filed its Answer and Defense of Lack of Subject Matter Jurisdiction. Defendant City of Urbana then filed its Motion for Summary Judgment on April 9, 1996. Plaintiffs filed their Motion for Summary Judgment on April 11, 1996, alleging that the amended Human Rights Ordinance, as it related to Section 8 tenants, was preempted by the United States Housing Act (42 U.S.C. 1437, *et seq.*). All parties filed responsive pleadings.

The District Court heard arguments on April 24, 1996, at which time Assistant City Attorney Stephen Holz stated that the City of Urbana had no intention of prosecuting Plaintiffs under the amended ordinance. The District Court took the case under advisement. On May 30, 1996, the District Court entered an order dismissing the case for lack of jurisdiction. According to the District Court, Plaintiffs failed to show that they were in real and immediate danger of prosecution under the ordinance. Plaintiffs filed a timely Notice of Appeal on June 6, 1996.

The case was briefed for appeal and argued before the United States Court of Appeals for the Seventh Circuit on December 2, 1996. A written opinion was issued on January 6, 1997. While the Seventh Circuit disagreed with the District Court as to whether Plaintiffs established a credible threat of prosecution, they too held that Plaintiffs lacked standing. The Seventh Circuit, per Circuit Judge Easterbrook, held that Plaintiffs lacked standing because they failed to allege that the amended

ordinance required them to bear the costs of compliance. In other words, Plaintiffs failed to allege that any current or potential tenants at their properties could receive Section 8 assistance.

Plaintiffs Thomas D. Hays, Professional Property Management of C.U., Inc., and BNG Management filed a Petition for Rehearing. That petition was denied on January 22, 1997.

REASON FOR GRANTING THE WRIT

I.

The United States Court of Appeals for the Seventh Circuit's holding that Plaintiffs, as rental property owners, lacked standing to challenge the Constitutionality of the Human Rights Ordinance is in direct conflict with the prior holding of this Court in *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

Since 1925 this Court has held that a person who must comply with a law or face sanctions has standing to challenge the law's application to him, even if it is not yet in effect. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Since 1967 this Court has recognized that standing is similarly extended in situations involving business regulations. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153-154 (1967). In so deciding, this Court reasoned that:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs conduct of their affairs with serious penalties attached to non-compliance, access to the courts under the Administrative Procedure Act

> and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance,. . . .
>
> *Abbott Laboratories v. Gardner*, 387 U.S. at 153.

In analyzing the defendant government's arguments in *Abbott Laboratories*, this Court determined that plaintiffs had standing because the regulation was specifically directed at them; the regulations required plaintiffs to make significant changes in their everyday business practices, and if plaintiffs failed to comply with the rule, they were exposed to strong sanctions. *Abbott Laboratories v. Gardner*, 387 U.S. at 153-154.

Article III of the United States Constitution limits the jurisdiction of federal courts to actual cases or controversies. Generally, to establish standing plaintiffs must show that they have suffered some actual or threatened injury as a result of defendant's allegedly illegal conduct which is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). When ruling on a motion to dismiss for want of standing, the court must accept as true all material allegations of the complaint, drawing all reasonable inferences therefrom in favor of the plaintiffs. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). At the summary judgment stage, the plaintiff must set forth specific facts by affidavit or other evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. at 561.

These prior decisions strike a careful balance between the need to guard against advisory opinions and the need to ensure that those who are the objects of arguably unconstitutional statutes and regulations are not put in the Catch-22 situation of having to choose the

lesser of the two evils as between compliance and prosecution.

In the recent past, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (hereinafter "*Pennell*"), this Court reviewed the California Supreme Court's determination as to whether a landlord and landlords' association had standing to challenge the constitutionality of the City of San Jose's rent control ordinance. The ordinance in question allowed a hearing officer to consider, among other things, the "hardship to a tenant" when determining whether to approve a rent increased as proposed by a landlord. *Pennell*, 485 U.S. at 4. Violators of the Ordinance were subject to both civil and criminal penalties. *Pennell*, 485 U.S. at 6.

In their complaint, appellants stated that the named landlord was "an owner and lessor of 109 rental units in the City of San Jose" and that the association was "organized for the purpose of representing the interests of the owners and lessors of real property located in the City of San Jose". *Pennell*, 485 U.S. at 6. Appellants further stated that the real property owned by them was "subject to the terms of the Ordinance". During oral argument, appellants stated that the association represented landlords who had "many hardship tenants". *Pennell*, 485 U.S. at 6-8.

Appellees filed a motion to dismiss. They pointed out that the appellants never alleged that either the landlord or the association had "hardship tenants" who might trigger the Ordinance. Nor did appellants allege that they had been or would be injured by a determination that a

proposed rent increase was unreasonable on the grounds of tenant hardship. *Pennell*, 485 U.S. at 6.

In finding that the appellants had standing to challenge the Ordinance, this Court accepted the truth of both appellants' pleadings and statements made during oral argument that the association represented landlords who had "many hardship tenants". *Pennell*, 485 U.S. at 7-8. Specifically, this Court concluded:

> Accepting the truth of these statements, which appellees do not contest, it is not 'unadorned speculation' [citation omitted] to conclude that the Ordinance will be enforced against members of the Association. The likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III's requirement that '[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement' [citation omitted].
>
> *Pennell*, 485 U.S. at 8.

The *Pennell* decision has not been overruled *sub silentio* by this Court. It has not been criticized by this Court nor any other court. In fact, the *Pennell* decision has been consistently followed by this Court as well as the lower courts. Thus, this Court's analysis of the standing issue continues to play a vital role in Article III jurisprudence.

The factual circumstances and the Seventh Circuit's ruling in the present case are virtually identical to those of *Pennell*. Here, as in *Pennell*, rental property owners

challenged the constitutionality of a local ordinance which would affect their ability to autonomously manage their properties. Allegations in Plaintiff's Verified Complaint for Declaratory and Injunctive Relief included:

> [Paragraph 10]: based upon past business experience, including having some ongoing Section 8 tenancies, PPM and Hays have elected not to participate in the voluntary federal Section 8 program.
>
> [Paragraph 11]: pursuant to past business experience, BNG has elected not to participate in the voluntary federal Section 8 program.
>
> [Paragraph 15]: subsequent to the enactment of the amended Human Relations Ordinance, Plaintiffs and their agents and employees have received applications, personal and via telephone requesting the rental of Urbana real estate to a federal Section 8 tenant.
>
> [Paragraph 16]: [p]ursuant to the federal Section 8 program, Plaintiffs, if participating in the program, must sign a HUD Addendum, . . . which is unacceptable to Plaintiffs for business reasons including, but not limited to, requirements regarding the length of rental term, the manner of notice and eviction, the manner of fluctuating rental subsidy, and matters relating to security deposits.

To satisfy the Seventh Circuit's heightened requirements of factual proof of standing at the summary judgment stage, Plaintiffs supported their pleading with affidavits and other evidence. Specifically, Plaintiffs recounted the events that led to the amendment of the ordinance, attaching the deposition of Defendant's

Human Relations Officer Vacellia Clark to their pleadings. Ms. Clark testified that the amendment was a direct result of a complaint that she had received against Town and Country Apartments, which were the property of Plaintiff BNG Management. In so doing, Plaintiffs clearly showed that they were the impetus for the amendment and that Ms. Clark would not hesitate to file a complaint against them under the amended ordinance. Thus, Plaintiffs established the past and continuous eligibility of their properties for the Section 8 program as well as a credible threat of enforcement.

Plaintiffs also specified their objections to participating in the Section 8 program. In particular, Plaintiffs opposed allowing the federal government to dictate the length of rental terms, the manner of and notice needed for eviction, rent levels, security deposits, as well as lease terms. Compliance with the amended ordinance would require Plaintiffs to make immediate and significant changes in the conduct of their affairs. Failure to comply, however, could lead to social stigma as well as serious civil and quasi-criminal sanctions.

Further, Plaintiffs attached the affidavit of Plaintiff BNG Management employee Jan Walsh, recounting the March 1996, telephone call that she received from an individual named "Anthony" inquiring about Plaintiff's acceptance of Section 8 recipients. According to the City of Urbana's draft policy statement, Ms. Walsh's response to "Anthony" was arguably prohibited by the amended ordinance. Plaintiffs also included references to Kim McCloud's testimony before the Urbana City Council. Viewing this evidence in Plaintiffs' favor, they clearly established the presence of Section 8 participants in

Urbana as well as Urbana's election to participate in the Section 8 program.

In direct conflict with this Court's decision in *Pennell*, the Seventh Circuit Court of Appeals held that the Plaintiffs, as rental property owners, lacked standing to challenge Urbana's Human Rights Ordinance because they failed to allege that any current or potential tenants at their properties could receive Section 8 assistance. The Seventh Circuit Court of Appeals also found that oral argument was too late a date for Plaintiffs to elaborate on the inferences raised by their pleadings. In so doing, the court disregarded the approach that this Court took in *Pennell* when it considered averments that were first presented at oral argument. *Pennell*, 485 U.S. at 7-8.

Additionally, the Seventh Circuit ignored the dictates of the standing doctrine which forbid making credibility assessments at the pleadings stage. After reading the Appellate Court's opinion, one is left with the impression that the court misread Plaintiffs' pleadings and the record, or decided for reasons that are not entirely clear, that Plaintiffs were not truthful in stating their past involvement with Section 8 participants and their current inquiries from potential Section 8 tenants. The decision also evidences a belief that Vacellia Clark's deposition testimony about the passage of the amendment was either unimportant or unbelievable. Such determinations of credibility are not permitted at this stage of the proceedings. *Warth v. Seldin*, 422 U.S. at 501-502.

The inevitable practical effect of the Seventh Circuit Court of Appeals' decision is to leave these Plaintiffs as well as future litigants facing a Hobson's choice. They

may either comply with the arguably unconstitutional ordinance, bearing the costs and burdens of compliance, or risk suffering the stigma and penalty of prosecution prior to challenging the statute. Such a result ignores the historical development of the standing doctrine and flies in the face of this Court's holding in *Pennell v. City of San Jose*. Accordingly, this Court should reject the analytical approach and decision of the United States Court of Appeals for the Seventh Circuit.

This case presents a unique opportunity for the Court to reconfirm long-lived principles of standing in civil rights declaratory judgment and injunctive actions. Plaintiffs and others seeking to bring such litigation should not be shackled with procedural handcuffs and chains that prevent reaching the merits of litigation that plainly affects their daily lives. Accordingly, the case at bar presents issues of national importance.

CONCLUSION

This Court should acknowledge the constitutional significance of the standing issue presented by this case and grant a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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April, 1997.

Appendix Index

Exhibit A – Opinion of the United States District Court for the Central District of Illinois in *Thomas D. Hays, Professional Property Management of C.U., Inc. and BNG Management v. The City of Urbana, Illinois* No. 96-CV-2044 ..... 1a

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Exhibit C – Order denying Petition for Leave for Rehearing 14a

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Exhibit E – Urbana Ordinance No. 9596-66, amending Chapter 12 of the Code of Ordinances of the City of Urbana, Illinois, entitled "HUMAN RIGHTS", as passed on January 22, 1996 ..... 16a

EXHIBIT A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

THOMAS D. HAYS,
PROFESSIONAL PROPERTY MANAGEMENT
OF C.U., INC., and BNG MANAGEMENT, a
partnership,

PLAINTIFFS,

vs. 96-CV-2044

THE CITY OF URBANA, ILLINOIS,

DEFENDANT.

ORDER OF DISMISSAL FOR LACK OF JURISDICTION
(Filed May 30, 1996)

The United States Housing Act (42 U.S.C. §1437f *et seq.*) provides that rental property owners may contract with the government to accept tenants who receive assistance payments for the cost of their housing under Section 8 of the statute. If the property owner does make that contract then he must adopt certain tenant selection procedures that are satisfactory to the Secretary of Housing and Urban Development. The statute doesn't say anything about landlords being required to enter into contracts for the acceptance of tenants who receive Section 8 subsidies. The City of Urbana in January 1996 amended its Human Rights Ordinance, that prohibited discrimination against persons seeking rental housing on the basis of their sources of income, to say specifically that source of income included "Secton 8 or any other rent subsidy or rent assistance program. . . . "

The plaintiffs, who own, market, develop, sell, and manage rental real estate in Urbana, Illinois, and who have elected not to enter into contracts to accept rent subsidies under the Housing Act, allege the Urbana ordinance violates their constitutional rights to due process under the Fourteenth Amendment and is a violation of the Supremacy Clause. They seek equitable and declaratory relief and attorneys' fees and expenses. What the plaintiffs allege is that they fear they will be prosecuted under the ordinance and subjected to civil and quasi-criminal penalties for failure to accept Section 8 tenants. The City, on the other hand, states solemnly in open court, that it has no intention of prosecuting the plaintiffs under the ordinance. The parties have filed cross motions for summary judgment and the City, in addition, has moved to dismiss for failure to allege an existing case or controversy.

In opposition to the City's motion to dismiss the plaintiffs, claiming a genuine case or controversy, refer to the deposition of the City's Human Relations Officer. The Human Relations Officer testified that she would file a complaint with the City's attorney if a person seeking rental property came to her and said that a landlord refused to consider him as a tenant because he had a Section 8 voucher. Clark dep. p. 49. The City counters by pointing out that the Human Relations Officer has no power to prosecute, to compel appearances, or to impose sanctions of any kind. "The filing of a formal complaint with the Human Relations Officer does not constitute a prosecution." Def. Supp. Mem. on Standing, p. 12. The plaintiffs also rely on public statements by one city council member about enforcement of the ordinance. The City

points out that the opinions expressed by an individual council member were not directed against the plaintiffs and, in any event, could not be considered an immediate threat because the individual member lacked the power to prosecute. Finally, the plaintiffs point to the City's public policy statement of March 5, 1996 concerning the amendment to the ordinance. Exhibit F, Pltfs. Appendix, Dkt. #27. That policy statement is certainly unequivocal that the City deems that tenant rejection based *solely* on the tenant's being a Section 8 participant is discriminatory. "Discriminatory practices . . . include: Having a policy against considering potential tenants who would use Section 8 housing assistance." *Id.* F2. Of course the policy statement contains many qualifications as to what would constitute discrimination against a Section 8 participant and points out that the ordinance will be enforced on an individual case basis. The City also points out that the plaintiffs have not made an allegation or made submissions that would support the claim that the plaintiffs have rental properties that would qualify for Section 8 support.

A litigant must first establish the existence of a case or controversy to invoke a federal court's jurisdiction. U.S. Const. art. III, §2; *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). To show a case or controversy exists, the litigant "must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) requires the plaintiff to assert that he "has sustained or is immediately in danger of sustaining some direct injury." The threat of injury

must be both "real and immediate," not "conjectural" or "jypothetical." *Id.* Neither the complaint nor the submissions in response to the court's order for a more detailed statement demonstrating standing to sue show that the plaintiffs are in real and immediate danger of prosecution under the ordinance. The same can be said for materials in support and opposition to the motions for summary judgment.

Schmidling v. City of Chicago, 1 F.3d 494 (7th Cir. 1993) is directly in point and dispositive. The "genuine fear" of the *Schmidling* plaintiffs that they would be prosecuted for violation of Chicago's weed ordinance was "inadequate to show that the City has caused that fear." "We find no allegations in the first amended complaint that the City has threatened the plaintiffs in any way with prosecution under the current ordinance. For the purposes of determining standing, we are initially and primarily concerned with the threat of prosecution, not with a litigant's anticipation of it." (citations omitted). "Indeed, because the plaintiffs are not engaged in any constitutionally protected conduct or expression, that is not one of those cases where the mere existence of a law can, under the correct circumstances, serve as a sufficient threat in and of itself to give a litigant standing to sue." (citation omitted). *Id.* at 499-500.

The plaintiffs at best claim that they have a "genuine fear" or prosecution and that is insufficient under the circumstances of this case to create a genuine controversy. For the reasons stated the defendant's motion to dismiss is allowed.

It is therefore ordered that the case is dismissed for lack of subject matter jurisdiction.

Enter this 30th day of May 1996.

/s/ Harold A. Baker
Harold A. Baker
Senior United States District Judge

EXHIBIT B

Thomas D. HAYS, et al.,
Plaintiffs-Appellants,

v.

CITY OF URBANA, ILLINOIS,
Defendant-Appellee.

No. 96-2425.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 2, 1996.
Decided Jan. 6, 1997.

Rehearing Denied Jan. 22, 1997.

Owners and managers of rental properties brought § 1983 action against city, alleging that Section 8 of the United States Housing Act, which provides subsidies for low-income renters, preempted city ordinance that precluded them, when choosing tenants, from considering prospective tenants' source of income. The United States District Court for the Central District of Illinois, Harold Albert Baker, J., dismissed action for want of case or controversy. Plaintiffs appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) City Attorney's representation that he had no immediate plan to prosecute any plaintiff for noncompliance with ordinance did not deprive owners of standing to bring preenforcement challenge, but (2) plaintiffs failed to allege that ordinance required them to bear costs of compliance.

Affirmed.

J. Steven Beckett (argued), Holly Clemons, Beckett & Webber, Urbana, IL, for plaintiffs-appellants.

Stephen J. Holz (argued), Jack Waaler, City of Urbana, Urbana, IL, for defendant-appellee.

Before CUMMINGS, EASTERBROOK, and ROVNER, Circuit Judges.

EASTERBROOK, Circuit Judge.

Section 8 of the United States Housing Act, 42 U.S.C. § 1437f, provides subsidies for low-income renters. So far as the national government is concerned, landlords may decide whether to participate in § 8 programs. So far as the City of Urbana, Illinois, is concerned, landlords must participate. In January 1996 the City added "source of income" to the list of characteristics that landlords may not consider when choosing tenants. The function and admitted purpose of this ordinance is to require lessors to treat § 8 subsidies and vouchers the same way they treat cash; if they lease to tenants who pay from their income or savings, they must also lease to tenants who pay from the federal Treasury. Several real estate owners and managers, who do not want to accept the strings that the national government attaches to participation in the § 8 program, filed this suit under 42 U.S.C. § 1983, seeking a declaration that § 8 preempts any local ordinance that requires renters to join the federal program. According to *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989), such a claim may be raised using § 1983 when the adversary is a municipality, even though preemption usually is no more than a defense to a claim filed in state court.

Relying on *Schmidling v. Chicago*, 1 F.3d 494 (7th Cir.1993), the district court dismissed the complaint for want of a case or controversy justiciable under Article III of the Constitution. In the district court, Urbana's City Attorney represented that he had no immediate plan to prosecute any of the defendants for noncompliance with the amended ordinance. Absence of any looming threat of prosecution, the district judge concluded, means that plaintiffs lack standing. Some language in *Schmidling* supports that conclusion. Several persons who cultivated "natural gardens" containing "a variety of native Illinois wild flowers and prairie plants" (1 F.3d at 495) sought an injunction against the application of Chicago's weed-control ordinance. We held that they lacked standing, because they did not face prosecution: on the natural gardeners' own theory their plants were not "weeds," and they were not entitled to an order from a federal court instructing Chicago to avoid mis-applying local laws. Cf. *Pennhurst School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Although the plaintiffs in *Schmidling* argued that Chicago's ordinance was too vague, proof of that proposition depended on application, and the City had not attempted to apply the ordinance in a way that would create a genuine vagueness problem. Prosecutions under an earlier version of the weed-control ordinance, and an ongoing prosecution of a natural gardener whose plants encroached on a neighbor's yard, did not establish a threat of injury from any proper application of the law to the plaintiffs, we held. Then the panel added: "To establish standing, the plaintiffs must also show that the City has threatened them with immediate prosecution under the current weed

ordinance." 1 F.3d at 499. It was this language, coupled with the City Attorney's statement, that led the district court to conclude that Urbana's real estate owners and managers lack standing.

The passage we have quoted from *Schmidling* was unnecessary to the disposition, and this brief dictum cannot be considered authoritative. Long ago, the Supreme Court held that a person who must comply with a law or face sanctions has standing to challenge its application to him, even if the threat of prosecution is not immediate – indeed, even if the law is not yet in effect. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (suit commenced four years before law was to take effect, and resolved on the merits by the Supreme Court two years before its effective date); *Virginia v. American Booksellers Association, Inc.*, 484 U.S. 383, 393, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988) ("We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."). What is necessary for standing is a concrete injury, redressable by success in the litigation. Costs of compliance necessary to avoid prosecution can constitute that injury. Plaintiffs have alleged that compliance would be costly, because the federal government would require longer lease terms and lengthy procedures to evict tenants. These costs would be avoided if they prevail. The City Attorney has not announced that the amended ordinance is a dead letter, never to be enforced; he represents only that he will not prosecute the plaintiffs until he has

evidence that they have violated the law. If such a declaration prevents adjudication under Article III, then persons affected by a law always must bear either the costs of compliance or the penalties for noncompliance if they want an adjudication. *Pierce* and *American Booksellers* hold that they need not. Urbana suggests that these cases establish a special rule for constitutional claims, but their approach was extended to business regulation by *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153-54, 87 S.Ct. 1507, 1517-19, 18 L.Ed.2d 681 (1967), which held that businesses potentially affected by a regulation may pursue preenforcement challenges to learn whether they must incur the costs of compliance. The City Attorney's representation that no prosecution is in the offing, because he has no evidence of any violation, therefore does not deprive the plaintiffs of standing.

Plaintiffs lack standing nonetheless, because they have not alleged that the amended ordinance requires them to bear costs of compliance. They contend that enrolling in the § 8 program would be costly, and at the pleadings stage such allegations must be accepted. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136-37, 119 L.Ed.2d 351 (1992). But plaintiffs will not be in a position to discriminate according to potential tenants' "source of funds," and therefore will not need to sign up, unless the federal government is willing to pay the rent at apartments they own or manage. The complaint is silent on this subject, and plaintiffs do not contend that any current or potential tenants could receive § 8 assistance at their properties.

Section 8 establishes two kinds of programs: "certificate" and "housing voucher". Persons eligible under the

certificate program tender a federal certificate in full payment of their rent – but only at apartments renting for less than 120 percent of a defined "fair market rental". 42 U.S.C. § 1437f(c)(1). Plaintiffs have not alleged that any of their apartments carries a monthly rental less than or equal to the rate that makes them available to tenants who have § 8 certificates. At depositions, all of the plaintiffs (or their representatives) either conceded that none of their apartments qualifies for the certificate program or professed ignorance about that subject. As for housing vouchers: neither the complaint nor any of the later documents in the case (including plaintiffs' appellate brief, see *American Inter-Fidelity Exchange v. American Re-Insurance Co.*, 17 F.3d 1018, 1021-22 (7th Cir. 1994)) contends that Urbana's public housing agency has elected to participate in that program, see § 1437f(o), let alone that any of the rental units is eligible for participation.

The district judge took note that "plaintiffs have not made an allegation or made submissions that would support the claim that the plaintiffs have rental properties that would qualify for Section 8 support." Plaintiffs' brief on appeal ignored this problem. When the City urged it as an alternative ground of affirmance, plaintiffs answered in their reply brief (citations omitted):

> Defendant also raised an issue as to whether or not plaintiffs have apartments in Urbana that qualify for Section 8. Noticeably absent in the amended ordinance was any reference that only landlords with apartments that qualify for the Section 8 program would be prosecuted. The amended ordinance was written in a way that the only issue was whether or not landlords

> have violated the amended ordinance by refusing to rent to Section 8 tenants. Whether or not plaintiffs had apartments that qualify for Section 8 under the certification program had no bearing on Defendant's opportunity to prosecute. Under the voucher program, "qualifying" apartments was not an issue, as all Section 8 voucher participants had the right to rent under the ordinance.

The brief is silent about the certificate program and does not furnish us any reason to believe that in Urbana there are any "voucher participants." Perhaps plaintiffs want to have things both ways: they would like a court to override the ordinance, but, if they lose, they want to be able to say that they *still* needn't rent to § 8 tenants.

Everyone likes a no-lose position. But litigants who can't lose can't win either, for only the risk of loss avoids making the case a quest for an advisory opinion. Plaintiffs' submission that it does not matter whether any of their apartments qualifies is not bolstered by argument, and it does not make sense. Urbana told the plaintiffs that they could not discriminate according to tenants' "source of funds," but if the federal government will not pay for low-income tenants to occupy plaintiffs' apartments, then § 8 is not a "source of funds." At oral argument, plaintiffs' counsel invited us to tour the record in search of information that might support a conclusion that some residents of Urbana hold housing vouchers that could be used at their apartments, but this is not how litigation works. Judges resolve the parties' disagreements; a litigant who has some contention to make must advance it, and the elements of standing do not differ from the other

essential ingredients of a party's case. *Defenders of Wildlife*, 504 U.S. at 561-62, 112 S.Ct. at 2136-37. Plaintiffs were silent on this question in their complaint, in the district court, in their opening brief, and in their reply brief. Oral argument is too late.

AFFIRMED

EXHIBIT C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 22, 1997.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

THOMAS D. HAYS, *et al.*, *Plaintiffs-Appellants,*	)	Appeal from the United States District Court for the Central District of Illinois.
No. 96-2425 v.	)	No. 96-CV-2044
CITY OF URBANA, ILLINOIS, *Defendant-Appellee.*	)	Harold A. Baker, *Judge.*

Order

Plaintiffs-appellants filed a petition for rehearing on January 21, 1997. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

EXHIBIT D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 14, 1997

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

THOMAS D. HAYS, PROFESSIONAL PROPERTY MANAGEMENT OF C.U., INCORPORATED, an Illinois corporation and BNG MANAGEMENT, a partnership,	] Appeal from the United States District Court for the Central District of Illinois, Danville Division.
Plaintiffs-Appellants,	] No. 96 C 2044 Harold A. Baker, Judge.
No. 96-2425 v.	]
CITY OF URBANA, ILLINOIS, a municipal corporation,	]
Defendant-Appellee.	]

Upon consideration of: "MOTION TO STAY THE MANDATE" filed on February 12, 1997, by counsel for appellants,

IT IS ORDERED that the motion is **DENIED.**

EXHIBIT E

ORDINANCE NO. 9596-66

AN ORDINANCE AMENDING CHAPTER 12, "HUMAN RIGHTS" OF THE CODE OF ORDINANCES OF THE CITY OF URBANA, ILLINOIS

BE IT ORDAINED BY THE URBANA CITY COUNCIL that Chapter 12 of the Code of Ordinances of the City of Urbana, Illinois, entitled "HUMAN RIGHTS", is hereby amended as follows:

Section 1.

Section 12-39 is amended to add the following underlined language:

Sec. 12-39. Definitions.

* * *

Discrimination. Any practice or act which is unlawfully based wholly or partially on the race, color, creed, class, national origin, religion, sex, age, marital status, physical or mental handicap, personal appearance, sexual preference, family responsibilities, matriculation, political affiliation, prior arrest or conviction record or source of income of any individual, *or any subclass of the above groups.*

* * *

Matriculation. The condition of being enrolled in college or a university, *whether as an undergraduate, graduate or professional student in any area of study, full-time or part-time, in either a degree or non-degree program,* or in a business, nursing, professional, secretarial, technical or

vocational school or an adult educational program.

* * *

Source of income. The point or form of the origination of legal gains of income accruing to a person in a stated period of time; from any occupation, profession or activity, from any contract, agreement or settlement, from federal, state or local payments, *including Section 8 or any other rent subsidy or rent assistance program,* from court ordered payments, or from payments received as gifts, bequests, annuities, or life insurance policies.

Section 2.

All ordinances, resolutions or motions or parts thereof, in conflict with the provisions of this Ordinance are, to the extent of such conflict, hereby repealed.

Section 3.

The City Clerk is directed to publish this Ordinance in pamphlet form by authority of the corporate authorities, and this Ordinance shall be in full force and effect from and after its passage and publication in accordance with Section 1-2-4 of the Illinois Municipal Code.

This Ordinance is hereby passed by the affirmative vote, the "ayes" and "nays" being called, of a majority of the members of the Council of the City of Urbana, Illinois, at a special meeting of said Council held upon proper notice.

PASSED by the City Council this 22nd day of January, 1996.

AYES: Hayes, Kearns, Patt, Ryan, Taylor
NAYS: Whelan
ABSTAINED:

/s/ Phyllis D. Clark Phyllis D. Clark, City Clerk
by Deborah J. Roberts
Deputy Clerk

APPROVED by the Mayor this 24th day of January, 1996.

/s/ Tod Satterthwaite

Tod Satterthwaite, Mayor

MAY 8 1997

CLERK

No. 96-1594

In The

Supreme Court of the United States

October Term, 1996

THOMAS D. HAYS, PROFESSIONAL PROPERTY MANAGEMENT OF C.U., INC., an Illinois Corporation, and BNG MANAGEMENT, a Partnership,

Petitioners,

v.

THE CITY OF URBANA, ILLINOIS, a Municipal Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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May, 1997

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QUESTION PRESENTED

Whether the lower court's dismissal for lack of jurisdiction under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), due to the Petitioners' failure to produce evidence supporting jurisdiction in response to a factual attack on jurisdiction, is in accord with *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

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STATUTE

Urbana Ordinance No. 9596-66 3

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATEMENT OF THE CASE

Pursuant to its Rule 15.2 obligation, the Respondent points out the following inaccuracies and misstatements made in the petition:

The Petitioners completely fail to mention that they have no apartments that are subject to the ordinance. This was affirmatively admitted by one of them in deposition, while the other two admitted in deposition to having said so in the past but later claimed ignorance of the matter.

Despite those admissions, which the Respondent presented in its motions to dismiss for lack of jurisdiction and for summary judgment, the Petitioners ask the court to infer that they have apartments subject to the ordinance. (Pet. at 3.)

The Petitioners claim that the amendment was instigated by a city official who received a "complaint" about one of them. (Pet. at 3.) The official, some time before the passage of the ordinance, received only an anonymous inquiry from a caller who left no information whatsoever. It is unknown whether the inquiry was from an applicant or from a landlord seeking to ascertain the City's position.

From that phone call the Petitioners ask the court to infer that the entire legislative process by which the ordinance was passed was aimed at them. The facts at

summary judgment completely contradicted that odd conspiracy theory. As for the time it took to pass the ordinance, the uncontested evidence showed that what the Petitioners characterize as an "expedited" (Pet. at 3) process was merely a decision not to tie the amendment to a long-running comprehensive review. There is no evidence that the amendment was directed at the Petitioners. The amending process included several City Council meetings, several Human Relations Commission hearings, numerous public notices, and input from a broad spectrum of the public. During this entire process, there was no mention of any alleged violation or complaint against the Petitioners.

The ordinance does not "effectively mandate," (Pet. at 4), participation in the Section 8 program. As the Circuit Court stated, since the Petitioners may not receive Section 8 funds because they have no apartments that qualify, they cannot be held liable under the ordinance. (Op., Pet. App. at 12a.) Similarly, the Petitioners claim incorrectly that the ordinance requires that they "make immediate and significant changes in the conduct of their affairs." (Pet. at 12.) On the contrary, because they have no qualifying apartments, they need make no such changes.

The Respondent City did not "issue," (Pet. at 5), a draft policy on the ordinance amendment. The Petitioners obtained, through discovery, a draft, unfinished statement that was never circulated or implemented, much less issued.

The Petitioners state that the Circuit Court held there was no standing because of what they "failed to allege."

(Pet. at 6, 7, 13.) While the Circuit Court did note that the Petitioners failed to make the proper allegations, (Op., Pet. App. at 11a), the court based its holding on the Petitioners' failure to produce evidence. (Op., Pet. App. at 12a-13a.)

The Petitioners claim to have met the requirements for standing by alleging that they have "some ongoing Section 8 tenancies," (Pet. at 11), is inaccurate and misleading. Those tenancies are in apartments outside the jurisdiction of the City and are therefore not subject to the ordinance. After extensive discovery, the Petitioners repeatedly failed to show that they have any apartments within City's jurisdiction qualified for Section 8 funds. Nor can their claim that they have received inquiries about whether they would accept Section 8 funds mean that they are subject to the ordinance. (Pet. at 11.) The ordinance does not forbid them from telling callers that they do not have any units that qualify for Section 8 benefits. (Ordinance 9596-66, section 12-39, Pet. App. at 16a-17a.)

Lastly, the Petitioners made some suggestion in the courts below that an applicant carrying a Section 8 voucher could use the voucher for any apartment regardless of whether the apartment "qualifies" for Section 8 under the reasonable rent maximums. That suggestion, which was not expressly repeated in their Petition but which was made to the Circuit Court, (Pet. App. at 12a), is incorrect. Under both the voucher and certificate program apartments must fall below a maximum reasonable rent level in order to qualify for Section 8 funds.

REASONS FOR DENYING THE WRIT

The issue presented in the Petition is narrow and unique to the immediate parties. There is no conflict among circuits nor any direct and apparent conflict with the decision of this Court. In addition, the Petitioners did not raise the *Pennell* issue in the Circuit Court.

A. There Is No Conflict with the Decisions of This Court

The Circuit Court's holding was based on this Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Circuit Court applied the rule that, when the party challenging jurisdiction produces facts that negate the existence of jurisdiction, the party asserting jurisdiction bears the burden of producing facts that support the existence of jurisdiction. (Op., Pet. App. at 12a-13a (citing *Lujan*, 504 U.S. at 561-62).

Pennell v. City of San Jose, 485 U.S. 1 (1988), deals with a different issue. In *Pennell*, jurisdiction was tested solely on the basis of the allegations made in the complaint and at oral argument, the truth of which were not contested. *Id.* at 6-8. The defendant in that case raised no factual challenge to the allegations that were required to support jurisdiction. *Id.* at 7-8.

In the present case, by contrast, the Respondent did challenge the existence of facts necessary to support jurisdiction and presented evidence negating jurisdiction. At oral argument, rather than pointing to specific evidence that they had apartments within the boundaries of the City qualifying for Section 8 benefits, the Petitioners

invited the Circuit Court to search through the record for such evidence itself. The Circuit Court held that the Petitioners' failure to produce specific facts supporting jurisdiction – not their failure to make the proper allegations – required dismissal under *Lujan*. (Op., Pet. App. at 12a-13a).]

Nothing in *Pennell* supports the Petitioners' apparent argument that an invitation at oral argument for the court itself to sort through the record suffices as specific evidence to counter their own admissions negating jurisdiction. Even in this Petition for Certiorari, the Petitioners fail to point to such evidence, offering only the same misleading inferences they raised in their briefs to the lower courts.

The issue, as made clear by the Circuit Court, is that the ordinance applies, by its terms, only to those landlords whose properties would actually qualify for Section 8 funds. (Op., Pet. App. at 12a.) The Petitioners' failure to rebut the Respondent's evidence showing that the Petitioners have no apartments within the City that qualify for Section 8 funds required the Circuit Court to apply the rule of *Lujan*. (Op., Pet. App. at 12a-13a.) The holding of *Pennell* regarding uncontested allegations has no bearing on this issue.

B. There Is No Conflict Among the Circuits

The Petitioners do not claim that there is a conflict among the circuits. Rather, they ask the Court to use this case merely to "reconfirm" the holding of *Pennell*. (Pet. at 14.) That opportunity alone does not merit review by the

Court. This is particularly true where the Petitioners failed to raise *Pennell* in the Circuit Court, even in their petition for rehearing.

C. Petitioners Are Precluded from Raising *Pennell* for the First Time in This Court

The Petitioners' argument that *Pennell* should have controlled the decision below is contradicted by their failure to bring that case to the attention of the Court of Appeals at any time, including the petition for rehearing. Because the *Pennell* case was not addressed by the Court of Appeals, this Court would be handicapped in evaluating that court's holding in the context of *Pennell*.

D. This Case Has No Impact Beyond the Parties Involved

This is a fact-specific case that has no impact beyond the parties involved. Ultimately, the Petitioners are left to argue that the Circuit Court "misread" the record. (Pet. at 13.) As adjudication by this Court would have no broad application, review on certiorari is not merited.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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May, 1997